RECORD AND BRIEF

Supreme Court, U.S.
FILED
AUG - 5 2016
OFFICE OF THE CLERK

No. 15-513

IN THE
Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, EX REL.
CORI RIGSBY; KERRI RIGSBY,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Kate Comerford Todd
Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER
1615 H. St. NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Robert A. Long
Counsel of Record
Mark W. Mosier
David M. Zionts
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20004-2401
rlong@cov.com
(202) 662-6000

Counsel for Amici Curiae

(Additional Counsel Information on Inside Cover)

K. Richard Foster
FINANCIAL SERVICES ROUNDTABLE
600 13th Street, NW
Suite 400
Washington, DC 20005
(202) 589-2424

Counsel for the Financial Services Roundtable

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. False Claims Act Defendants Face A Proliferation Of Litigation By Relators. 5

II. The FCA's Seal Requirement Should Be Rigorously Enforced. 8

A. The Court Of Appeals' Unbalanced "Balancing" Test Invites Relators To Break The Rules. 10

B. Dismissal Is The Proper Remedy For Relators Who Violate The Mandatory Seal Requirement. 18

C. Any Balancing Approach Must Punish Bad Faith And Guard Against Reputational Harms. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Ackerman v. Nw. Mut. Life Ins. Co.,
172 F.3d 467 (7th Cir. 1999) 15

United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.,
741 F.3d 390 (4th Cir. 2013) 8

United States ex rel. Clausen v. Lab. Corp. of Am., Inc.,
290 F.3d 1301 (11th Cir. 2002) 15

Dolan v. United States,
560 U.S. 605 (2010) 20

Doyle v. Hasbro, Inc.,
103 F.3d 186 (1st Cir. 1996) 15

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999) 15

Heckler v. Chaney,
470 U.S. 821 (1985) 19

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) 19

Leon v. IDX Sys. Corp.,
464 F.3d 951 (9th Cir. 2006) 22

United States ex rel. Lujan v. Hughes Aircraft Co.,
67 F.3d 242 (9th Cir. 1995) ..... *passim*

Milner v. Dep't of the Navy,
562 U.S. 562 (2011) 17

United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.,
707 F.3d 451 (4th Cir. 2013) 15

United States ex rel. Pilon v. Martin Marietta Corp.,
60 F.3d 995 (2d Cir. 1995) 9, 15, 16

Salmeron v. Enter. Recovery Sys., Inc.,
579 F.3d 787 (7th Cir. 2009) 21

Smith v. Clark/Smoot/Russell,
796 F.3d 424 (4th Cir. 2015) 9, 15, 16

United States ex rel. Summers v. LHC Grp., Inc., 623 F.3d 287 (6th Cir. 2010) ..... *passim*

United States v. McNinch,
356 U.S. 595 (1958) 6

United States v. Sci. Applications Int'l Corp., 626 F.3d 1257 (D.C. Cir. 2010) 6

Universal Health Servs., Inc. v. United States ex rel. Escobar,
136 S. Ct. 1989 (2016) 6

Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 18

Statutes and Regulations

31 U.S.C. § 3729 7

31 U.S.C. § 3730 ..... 2, 9, 18

28 C.F.R. § 85.3 7

Other Authorities

Dep't of Justice, Fraud Statistics—Overview: Oct. 1, 1987 – Sept. 30, 2015 (Nov 23, 2015), http://tinyurl.com/2015FCAStats 5, 6

Dep't of Justice, Interim Final Rule, Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42,491 (June 30, 2016) 8

David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 Colum. L. Rev. 1244 (2012) 7

David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 Colum. L. Rev. 1913 (2014) 6, 12, 20

David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689 (2013) 6

Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009) 19

Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), http://tinyurl.com/DeleryFCA 5

Restatement (Second) of the Law of Contracts § 331 18

S. Rep. No. 99-345 (1986) 16

U.S. Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem* (Oct. 2013), http://tinyurl.com/LawsuitEcosystem 6

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the Nation's business community, including cases involving the False Claims Act ("FCA").

The Financial Services Roundtable ("FSR") represents 100 of the largest integrated financial services companies providing banking, insurance investment products, and services to the American consumer. Member companies participate through the Chief Executive Office ("CEO") and other senior executives nominated by the CEO. FSR member companies account directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed with the Clerk letters granting blanket consent to the filing of *amicus* briefs.

Amici's members are common targets of private *qui tam* actions under the FCA. A rising tide of FCA litigation subjects defendants to potential abuse, including tactical violations of the statute's seal requirement. Even when the underlying fraud allegations are meritless, *amici*'s members are exposed to serious reputational harm and the pressure to settle. *Amici* have substantial interests in ensuring that the FCA's seal requirement is enforced in an appropriate and meaningful manner.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental question in this case is whether the first review of a *qui tam* complaint will take place in the halls of government or across websites and television screens. Should the federal government be allowed to control the pace and publicity of any investigation? Or should a private relator be free to go to the press with inflammatory allegations immediately upon filing a complaint, leveraging the power of the Internet and the nightly news in aid of securing a settlement?

Congress chose the former approach, demanding that *qui tam* complaints "shall" remain under seal. 31 U.S.C. § 3730(b)(2). If "shall" is to mean "shall," then noncompliance with the seal requirement cannot be lightly disregarded. Yet under the approach taken in the decision below, relators can violate the law practically with impunity. Private relators are already armed with the power to threaten massive, and often disproportionate, penalties for alleged violations of the FCA. The prospect of "exposing a

defendant to immediate and hostile media coverage" only adds to a private relator's "leverage to demand that a defendant come to terms quickly." *United States ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287, 298 (6th Cir. 2010). The flawed "balancing" test applied by the court of appeals does nothing to address this important problem.

This Court should hold that "shall" means "shall." At a minimum, if the Court does not determine that a seal violation requires dismissal in *all* cases, it should reject the court of appeals' approach that requires dismissal in virtually *no* cases. Any true "balance" must strongly deter tactical violations of the law by relators acting in bad faith, and take into account the legitimate rights of defendants not to have their reputations tarnished by private plaintiffs seeking to apply settlement pressure.

I. The judicial system has seen a significant increase in FCA lawsuits by private relators. The Government does not intervene in a large percentage of these cases, which frequently lack merit. There is nonetheless a significant incentive for relators to bring even weak FCA claims because of the settlement pressure they may create. In particular, the reputational harms an allegation of fraud may inflict on a defendant can create an impetus to settle even unmeritorious claims. Relators have added incentives to pursue such claims as a consequence of the FCA's remedial regime, which has given rise to staggering statutory penalty claims that may have little relation to the defendant's actual degree of culpability. Because the Government does not exercise its right to dismiss meritless *qui tam* actions, it is vital

that the courts strictly enforce the statutory requirements on private relators, including the seal requirement.

II. A. Rather than dismiss a complaint based on a bad-faith violation of the seal requirement, the court of appeals forgave the violation based on a "balancing" test that is deeply flawed. The court first required the defendant to prove *actual* harm to the Government, something even the Government will rarely be able to assess, let alone prove, at the relevant time. Next the court deemed it a "less severe" violation for the relator to broadcast sealed allegations in the media, finding technical filing-related violations more worthy of sanction. The court paid lip-service to bad faith, while making clear that egregious, willful violations of the seal requirement would rarely be punished. Finally, the court failed to take into account the legitimate reputational interests of defendants based on a flawed reliance on the FCA's legislative history.

B. Rather than follow a standard that incentivizes relators to violate the seal requirement, the Court should adopt a simple *per se* rule of dismissal. When a relator acts on the FCA's partial assignment of the Government's own claims, she must abide by the conditions on that assignment, including the seal requirement. It is not too much to ask a relator suing in the name of the Government to adhere to the conditions of Congress's delegation of law enforcement authority. Private enforcement of the law is already fraught with separation of powers concerns; courts should not adopt a rule that incentivizes private relators to ignore the very statute that grants them the

momentous power to sue on behalf of the United States.

C. If the Court does not adopt a *per se* rule of dismissal, it should at a minimum reject the court of appeals' flawed balancing test. Any balancing test must account for all relevant interests, including defendants' legitimate reputational concerns. Moreover, in light of well-established equitable principles and the need to deter tactical breaches of the seal requirement, the Court should instruct that bad faith violations generally merit dismissal.

ARGUMENT

I. False Claims Act Defendants Face A Proliferation Of Litigation By Relators.

In recent years the judicial system has experienced a massive increase in the filing of FCA lawsuits by private relators. In each year since 2011, more than 600 *qui tam* lawsuits have been filed. Dep't of Justice, Fraud Statistics—Overview: Oct. 1, 1987 – Sept. 30, 2015 (Nov. 23, 2015) ("DOJ Fraud Statistics"), http://tinyurl.com/2015FCAStats. The years 2013 and 2014 were the most litigious on record. *Id.*

The Government intervenes in less than a quarter of these cases. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Acting Assistant Attorney General Stuart F Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), http://tinyurl.com/DeleryFCA; U.S. Chamber Inst. for Legal Reform, *The New Law-*

suit Ecosystem, at 63 (Oct. 2013), http://tinyurl.com/LawsuitEcosystem. The remaining cases usually lack merit. *See* DOJ Fraud Statistics, *supra*; David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1720-21 (2013). But even though the Justice Department has authority to terminate private FCA actions, it "rarely" does so, "thus virtually ignoring the most direct means of policing undesirable private [actions]." David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 Colum. L. Rev. 1913, 1992 (2014).

One important cause of the proliferation of *qui tam* actions is the availability of new theories of FCA liability As originally enacted during the Civil War, the FCA was intended to combat a series of "sensational" frauds such as billing the War Department "for nonexistent or worthless goods." *United States v. McNinch*, 356 U.S. 595, 599 (1958). Relators now advance a much wider array of theories, including claims premised on "implied certification" of regulatory compliance. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001 (2016). As this Court has recognized, such theories are ripe for abuse, and must be subject to "strict enforcement of the Act's materiality and scienter requirements." *Id.* at 2002 (quoting *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1270 (D.C. Cir. 2010) ("*SAIC*")); *see also SAIC*, 626 F.3d at 1270 (noting that the implied certification theory is "prone to abuse by the government and *qui tam* relators who, seeking to take advantage of the FCA's

generous remedial scheme, may attempt to turn the violation of minor contractual provisions into an FCA action"). While it remains to be seen how the lower courts will apply this Court's recent admonition of "strict enforcement," relators will continue to press the boundaries in pursuit of potentially lucrative litigation.

As the proliferation of *qui tam* cases bears out, FCA litigation can exert a strong *in terrorem* effect, even where there is no meritorious claim. Relators can extract settlements from defendants averse to high discovery costs, the risk of large losses, and—of particular note in this case—reputational harms. One scholar of *qui tam* litigation has noted that "indifference to social cost may lead profit-motivated private enforcers to initiate so-called *in terrorem* lawsuits, using the threat of massive discovery costs or bad publicity to extract settlements when the social cost of adjudication would exceed any possible benefit or, worse, where culpability is entirely absent." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1254 (2012).

The incentive to pursue even weak claims is especially strong in light of the enormous damages relators often seek. The FCA provides for both treble damages and a statutory penalty that, until recently, ranged from $5,500 and $11,000 for each false claim. 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(a)(9). As of August 1, 2016, the Justice Department has almost *doubled* civil penalties under the FCA, which now range from $10,781 to $21,563 per violation. Dep't of Justice, Interim Final Rule, Civil Monetary Penalties

Inflation Adjustment, 81 Fed. Reg. 42,491 (June 30, 2016).

Due to the breadth of many government contracts, the number of distinct claims—and thus the overall penalty amount—may exponentially exceed any fair punishment for the alleged underlying scheme. One court of appeals, for example, adds a penalty for each invoice submitted by a contractor, resulting in what that court itself calls a "monster" imposing multi-million dollar liability. *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 407 (4th Cir. 2013). And in light of the recent penalty increase, relators can now threaten double the financial exposure for the same conduct. Companies may be pressured to settle claims simply because the FCA has been applied to escalate fines in a way that is unmoored from culpability.

This dynamic increases the incentive a relator may have to file even a weak complaint. Among the most attractive such cases for a private relator is one that the defendant would be eager to settle quickly, whatever the merits, to spare its reputation. Strict enforcement of the FCA's seal requirement plays an important role in reducing the *in terrorem* effect that weak claims can exert. Particularly in light of the lack of meaningful oversight by the Government over most *qui tam* claims, judicial enforcement of the conditions Congress has established is vital.

II. The FCA's Seal Requirement Should Be Rigorously Enforced.

The False Claims Act empowers individuals to bring lawsuits "in the name of the Government." 31

U.S.C. § 3730(b)(1). Unsurprisingly, Congress did not delegate this significant law enforcement power to private actors free of limitations. One important limitation the relator must respect is the Government's need for secrecy in FCA investigations. In the same subsection of the statute that creates the right to sue, Congress mandated that a complaint "*shall* remain under seal for at least 60 days." *Id.* § 3730(b)(2) (emphasis added).

This Court granted certiorari to resolve a division among the circuits regarding the consequences for a violation of the FCA's seal requirement. The Sixth Circuit has adopted a simple rule: a relator that violates Congress's instructions loses the right to sue on behalf of the United States. *Summers*, 623 F.3d at 296-98. The Second and Fourth Circuits apply a more flexible balancing test that considers a range of factors, including taking into account the defendant's legitimate reputational interests. *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 999 (2d Cir. 1995). The Fifth Circuit in the decision below, along with the Ninth Circuit, also applies a balancing test, but one that requires proof of actual harm to the Government, considers technical filing violations more "severe" than turning to the media, renders the relator's bad faith an afterthought at best, and disregards the defendant's reputation. Pet. App. 19a-23a; *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245-47 (9th Cir. 1995).

This Court should reject the "balancing" test applied by the court of appeals in this case. The

standard is flawed in numerous respects, and as a result leaves the seal requirement dramatically under-enforced—while sending a clear message to relators that violating the statutory command is a viable litigation tactic. This Court should adopt a clear rule that a relator who violates the law forfeits her delegated right to enforce the law. If, however, the Court believes a balancing test is more appropriate, it should adopt a standard that strongly punishes and deters bad faith, and accounts for defendants' legitimate reputational interests.

A. The Court Of Appeals' Unbalanced "Balancing" Test Invites Relators To Break The Rules.

In the decision below, the court of appeals acknowledged "the merits of a per se rule" of dismissal for relators who cannot abide by the statute that authorizes them to sue. Pet. App. 20a. It nonetheless declined to apply such a rule, instead adopting a three-part "balancing test." *Id.*

The Fifth Circuit's test, which it borrowed from the Ninth Circuit, nominally has three factors. First, the court assesses "the harm to the government from the violations." Pet. App. 19a. Second, it considers the "nature of the violations." *Id.* at 19a-20a. And third, it asks "whether the violations were made willfully or in bad faith." *Id.* at 20a.

As the Fifth and Ninth Circuit's application of this test reveals, however, it is actually quite *unbalanced*. Several deficiencies operate together to render the FCA's seal requirement frequently unenforceable. Far from striking a "balance" between

competing interests, the court of appeals' balancing test operates as an invitation to relators to run to the media to obtain an undue litigation advantage.

1. The first problem with the court of appeals' approach is the dominant factor in its analysis: the requirement of "harm." As the Ninth Circuit explains, the "balancing test" demands a showing that "the Government was *actually* harmed" by the specific disclosure, in the sense that it damaged the government's own investigation under the FCA. *Lujan*, 67 F.3d at 245 (emphasis added); *see also* Pet. App. 22a.

Lujan itself illustrates why, in practice, defendants may rarely be able to prove "actual harm," particularly at the relevant time. In that case, the Government submitted an equivocal statement: it could "not claim[] in this case that it was prejudiced," but it also was "not in a position to state[,] as a factual matter, that it was *not* prejudiced." *Lujan*, 67 F.3d at 246 (quoting Statement of Interest of the United States Regarding Defendant's Motion to Dismiss the Complaint) (emphasis added). Many cases are likely to reside in this gray area. And if the Government itself cannot (or will not) state whether it has been harmed, a defendant without access to the Government's internal deliberations may face an insurmountable barrier. The result could be time-consuming discovery and ancillary litigation just to answer the threshold question of whether a seal violation ought to have consequences.

Moreover, the Government will rarely (if ever) offer to a court an unsolicited statement that it was

harmed by a violation, and thus tacitly encourage the court to dismiss a case. *Cf.* Engstrom, *Private Enforcement's Pathways*, *supra*, 114 Colum. L. Rev. at 1992 (Government rarely exercises power to terminate meritless cases). Notably, while the Government requests that "due weight" be given if it "informs the court that its interests have not been prejudiced," it does not state that its silence should be interpreted as an indication that the Government was not harmed. *See* U.S. Cert. Br. 13. Given the Government's practice of declining to exercise its sovereign power to dismiss meritless private *qui tam* actions, there would be no basis for inferring from its silence that it believes a seal violation was not harmful and should have no consequence.

As the Sixth Circuit observed in rejecting a "balancing" test in favor of a *per se* rule, the requirement of actual harm turns one of the purposes of the seal requirement on its head. The non-disclosure "rules are in place precisely because Congress understood" that "the extent to which the Government might be harmed by disclosure is impossible to evaluate *a priori*." *Summers*, 623 F.3d at 298. By insisting on proof that Congress recognized would generally be unavailable, the demand for defendants to show "actual harm" leads courts not to enforce an express requirement Congress imposed on relators. The consequence of this abstention, moreover, is that relators have license to violate the requirement with limited fear of sanction.

2. The second factor considered by the court of appeals is "the nature of the violation." Pet. App. 19a-20a. In the formalistic view of the Fifth and

Ninth Circuits, the severity of the violation is divorced from any practical considerations. Instead, the courts of appeals have focused on filing technicalities: whether there was a "complete failure to file under seal or serve the government." *Id.* at 22a. The Ninth Circuit was willing to overlook disclosure of a case to a leading newspaper—the *Los Angeles Times*—because the relator had "fil[ed] her complaint *in camera* and serv[ed] it on the Government." *Lujan*, 67 F.3d at 246. In this case, the court of appeals deemed it a "considerably less severe" violation for the relators to make disclosures to "several news outlets," sit for an interview on "a national broadcast on ABC's 20/20 program," and notify a member of Congress, than if they had made a public court filing. Pet. App. 21a-23a.

This has it backwards. One of the key dangers the seal requirement guards against is the strategic impulse of relators to turn to the media to secure a litigation advantage. They can force defendants to first defend themselves in the court of public opinion without even having notice of the actual allegations in the files under seal. The court of appeals' "balancing" test asks judges to weigh whether certain statutory violations are worse than others, and then instructs that technical, filing-related violations are more severe than a concerted media strategy designed to pressure the defendant.

3. The third and final factor of the court of appeals' balancing test, at least nominally, is the relator's bad faith. In light of dynamics of FCA litigation that incentivize relators to turn to the media to maximize settlement leverage, any reasonable

balancing test would place significant weight on relators' bad faith. After all, it would make a mockery of Congress's decision to impose a seal requirement on relators if they could make a calculated decision to break the rules and *still* retain their right to sue in the name of the United States.

But under the court of appeals' test, bad faith is decidedly last and least. In this case, the court of appeals acknowledged that the relators' counsel acted in bad faith, but stated without explanation that "the *Lujan* factors [still] favor the Rigsbys." Pet. App. 23a. In other words, the fact that the defendant could not prove *actual* harm to the Government, and that the relators' violation consisted of turning to the media rather than a technical filing-related violation, outweighed the bad faith behind the violation—and outweighed it so decisively as to not warrant explanation.

As the Sixth Circuit has noted, a "balancing" test in which bad faith is so readily outweighed invites abuse. "Under such a regime, plaintiffs would be encouraged to make disclosures in circumstances when doing so might particularly strengthen their own position, such as those in which exposing a defendant to immediate and hostile media coverage might provide a plaintiff with the leverage to demand that a defendant come to terms quickly." *Summers*, 623 F.3d at 298. If courts are unwilling to punish bad-faith violations of the seal requirement, "the extent of a plaintiff's compliance would become subject to the same risk analysis as any other litigation tactic." *Id.* Relators would have an incentive to intentionally break the rules in order to inflict repu-

tational damage that may compel settlement at an early stage.

4. Finally, the court of appeals' balancing test is notable for what it does not consider: the legitimate reputational concerns of defendants publicly accused of fraud. Although the Fifth and Ninth Circuits have rejected this factor as irrelevant, the other two courts applying a balancing test properly recognize it. *See Smith*, 796 F.3d at 430; *Pilon*, 60 F.3d at 999.

Claims of fraud can be easy to level but difficult to rebut. Thus, one of the functions of the heightened pleading requirement for cases of fraud is to "protect defendants whose reputation may be harmed by meritless claims of fraud." *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 194 (1st Cir. 1996). As Judge Posner has noted, "public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual)." *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999). The concerns with "'protect[ing] defendants from harm to their goodwill and reputation'" are "as applicable in cases brought under the [False Claims] Act as they are in other fraud cases." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)); *see also United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1316 (11th Cir. 2002) (noting the risk of "undeserved harm to [FCA defendants'] goodwill and reputation").

One of the "purposes" of the "seal provision" is "to protect the reputation of a defendant in that the de-

fendant is named in a fraud action brought in the name of the United States, but the United States has not yet decided whether to intervene." *Smith*, 796 F.3d at 430 (citation omitted). As the Second Circuit has similarly noted, "a defendant's reputation is protected to some degree when a meritless *qui tam* action is filed [and the seal requirement is respected], because the public will know that the government had an opportunity to review the claims but elected not to pursue them." *Pilon*, 60 F.3d at 999. Moreover, a defendant's reputational concerns can complement the Government's interest. While defendants have especially strong interests in avoiding publicity from baseless allegations, in cases of a "potentially meritorious complaint" "a defendant may be willing to reach a speedy and valuable settlement with the government in order to avoid the unsealing." *Id.*

But the court of appeals in this case, like the Ninth Circuit, excludes the defendant's reputation from its "balancing" of interests. The *Lujan* court offered just one reason for excluding reputational concerns: the Senate Judiciary Committee's report on the False Claims Act did not express concern for "potential unfairness" to defendants. 67 F.3d at 247 (citing S. Rep. No. 99-345 (1986)). The Report does, however, recognize that "sealing the initial private civil false claims complaint protects both the Government *and the defendant's interests*." S. Rep. No. 99-345, at 24 (emphasis added). Congress certainly did not intend for the seal requirement to make defendants *worse* off, preventing them from seeing the actual court documents detailing the allegations

against them so that they may respond to relators tarnishing them in the press.

In any event, while this Court will sometimes invoke legislative history to supply "clear evidence of congressional intent [that] may illuminate ambiguous text," it refuses to "take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011). The statutory text here simply states that the seal requirement must be respected. The fact that one committee of one House of Congress did not expressly mention reputational concerns relating to this rule does not license courts to craft a standard for enforcement that excludes this relevant consideration.

* * *

Considered together, the court of appeals' "balancing" test is far from balanced. It places a potentially impossible burden on defendants to prove actual harm to the Government, draws formalistic distinctions among types of violations, overlooks glaring examples of bad faith, and ignores a relevant and important consideration simply because it is not mentioned in the legislative history. As a consequence, the court of appeals' approach would lead to significant under-enforcement of a mandatory rule Congress imposed on relators. This Court should reject the court of appeals' flawed test. Instead, it should follow one that actually enforces the statute and removes the incentive for relators to break the law in the name of enforcing the law.

B. Dismissal Is The Proper Remedy For Relators Who Violate The Mandatory Seal Requirement.

There is a straightforward solution to the shortcomings of the court of appeals' balancing test: enforce the law as Congress wrote it. Congress itself struck the balance it deemed appropriate when it provided, without exception, that a private *qui tam* complaint "*shall* be filed in camera," and "*shall* remain under seal for at least 60 days." 31 U.S.C. § 3730(b)(2) (emphasis added). Rather than attempt to divine the purposes of this requirement by a close reading of committee reports, the Court should recognize that "shall means shall," and enforce the rules accordingly.

Qui tam actions under the False Claims Act are a rarity in the law—private civil actions "brought in the name of the Government." *Id.* § 3730(b)(1). This Court views the FCA "as effecting a partial assignment of the Government's damages claim," a characterization the Court considered vital to the constitutionality of private relator actions. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). But in the same statutory provision that Congress authorized this assignment, it conditioned it, requiring (among other things) that the private relator respect the sealing of the complaint. *See* 31 U.S.C. § 3730(b). If the relator violates the condition, the assignment is ineffective, and the relator is stripped of her statutory right to proceed in the name of the United States. *Cf.* Restatement (Second) of the Law of Contracts § 331.

Relators and the Government regard this outcome as unduly harsh. But it is not too much to ask that a private relator accepting an assignment of law enforcement authority from the federal Government strictly comply with the statutory conditions on that assignment. If the assignment is effective, a private, often profit-motivated relator gains significant governmental power, allowing her to proceed in the name of the United States in pursuit of its interests. As this Court has noted, "with great power there must also come – great responsibility." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2415 (2015) (quoting S. Lee and S. Ditko, Amazing Fantasy No. 15: "Spider–Man," p. 13 (1962)). It would be unseemly, at a minimum, for a private relator cloaked with the authority of the U.S. Government to make illicit disclosures to the media in order to drive up the settlement value of a case. It is just as unseemly for a federal court to affirm that relator's entitlement to enforce the law on the Government's behalf.

This conclusion is bolstered by the separation of powers concerns that arise when private actors who have suffered no cognizable injury are authorized to enforce the law. Decisions concerning when, whether, and how to "take Care that the Laws be faithfully executed" are a quintessentially Executive function, imbued with considerations of policymaking and prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (citation omitted). "Virtually none of the checks on executive enforcement discretion apply to private parties." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 818 (2009). While the Justice Department could in principle more vigorously police

and terminate meritless or otherwise problematic private relator actions at the outset, in practice it does not do so (and lacks the resources to do so even if it were so inclined). *See* Engstrom, *Private Enforcement's Pathways*, *supra*, 114 Colum. L. Rev at 1992. Particularly in the absence of a strong check by the Executive, it is vital that courts enforce the statutory limitations on private relators' authority to sue on behalf of the United States.

Respondents and the Government urge that the seal requirement only be selectively enforced. They analogize this case to ones concerning the consequences for violating an ordinary deadline. Resp. Br. in Opp. 24-25 (citing *Dolan v. United States*, 560 U.S. 605, 610 (2010)); U.S. Cert. Br. 8 (same). But the seal requirement is no ordinary "time-related directive." *Dolan*, 560 U.S. at 611. Rather, it is a substantive rule closely tied to the relator's authorization to sue in the first place, and geared toward checking the abuses that can stem from private enforcement of the law. This Court should adhere to Congress's choice and enforce the condition it established.

C. Any Balancing Approach Must Punish Bad Faith And Guard Against Reputational Harms.

If the Court does not conclude that dismissal should be the sanction for all violations of the seal requirement, it should still not adopt the flawed balancing test adopted by the court of appeals. In the view of Respondents and the Government, a *per se* rule would over-enforce the statutory seal requirement. But if that is a problem, the solution is not to

dramatically *under*-enforce it. The so-called "balancing" test applied by the court of appeals would be unduly difficult to satisfy, and would leave relators with every incentive to break the rules. *See supra* § II.A.

Any balancing test must balance *all* relevant interests. Harm to the Government, and certainly not the court of appeals' requirement of proving actual harm, should not be effectively dispositive. Any judge-made standard for enforcing the statutory seal requirement should also account for the defendant's legitimate reputational interests. Allegations of fraud, even meritless ones, are easy to make, and their after-effects difficult to cure. Moreover, an unenforced seal requirement would leave defendants worse off than a regime with no seal at all; defendants may find themselves tarnished in the press by relators without even having the opportunity to understand and evaluate the allegations against them. If the Court endorses a discretionary balancing test, it should recognize defendants' legitimate reputational concerns together with other valid factors.

The Court should also adopt a simple, easily administrable rule in cases where bad faith is present: if a relator *intentionally* violates the seal requirement, she loses her entitlement to sue on behalf of the Government. As the Government recognizes, dismissal has been deemed an appropriate sanction in cases of bad faith. *See* U.S. Cert. Br. 11. Not just under the FCA but also in a broad range of contexts, dismissal is a fair response to bad-faith litigation tactics. *See, e.g.*, *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 798 (7th Cir. 2009) (dismissal of

case as sanction for "unauthorized disclosure" of document the parties had agreed would be limited to "attorneys' eyes only"); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (dismissal of case as sanction for willful spoliation of evidence). If the sanction for a violation of the seal requirement is not automatic but a matter of equitable discretion, then equity ought to matter—and it is not equitable for a relator with unclean hands to wield the law enforcement powers of the Government. Indeed, the downsides of this sanction are even lower than in the usual case. No one is denied the right to advance their own claim to redress their own injury; the relator is simply stripped of the authority to assert a particular claim on the Government's behalf.

A rule, or at least a strong presumption, in favor of dismissal in cases of intentional, bad-faith violations would also serve as a necessary deterrent. The law as the court of appeals conceived it presents a strong incentive for relators to turn to the media as a litigation or settlement tactic. If bad faith is reduced to nothing more than a minor, easily overridden factor in the "balancing," it would be rational for many relators to take their chances violating the statutory mandate in pursuit of their bounty. *See Summers*, 623 F.3d at 298.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Petitioner's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Kate Comerford Todd
Steven P Lehotsky
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H. St. NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Robert A. Long, Jr.
Counsel of Record
Mark W. Mosier
David M. Zionts
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

Counsel for amici curiae

K. Richard Foster
FINANCIAL SERVICES ROUNDTABLE
600 13th Street, NW
Suite 400
Washington, DC 20005
(202) 589-2424

Counsel for the Financial Services Roundtable

August 2016